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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

DAVID RANDALL JENKINS, STACIA LEE SUMWALT and THE JNC COMPANIES, an Arizona corporation,
Petitioners,

v.

ALAN D. DAVIDON, individually and in his official capacity as Deputy Pima County Attorney, et al.,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION

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October 5, 1992

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Was the district court within its discretion when it dismissed the petitioners First Amended Complaint based on violations of Rules 8(a), 21 and 41(b), Fed. R. Civ. P.?

2. Did the district court have jurisdiction to dismiss petitioners' lawsuit pursuant to Fed. F. Civ. P.?

3. Did the United States Court of Appeals for the Ninth Circuit abuse its discretion when it determined that Petitioners' appeal to that court was frivolous and sanctioned Petitioners with double costs and awarded attorney's fees to some of the Respondents?

LIST OF PARTIES

The parties to the proceedings below and to this Petition were and are the petitioners David Randall Jenkins, Stacia Lee Sumwalt and The JNC Companies, an Arizona corporation, and the respondents Alan D. Davidon, individually and in his of ficial capacity as Deputy Pima County Attomey; Millard Rowlctte, individually and in his of ficial capacity as Deputy Pima County Attomey; Stephen D. Neely, in his official capacity as Pima County Attomey; Jerry Goddard, individually; Pima County, Arizona, a body politic and corporate; Greg Lunn, in his official capacity as Pima County Supervisor for District 1; Dan Ekstrom, in his official capacity as Pima County Supervisor for District 2; Ld Moore, in his official capacity as Pima County Supervisor for District 3; Reg Morrison, in his official capacity as Pima County Supervisor for District 4; Raul Grijalva, in his official capacity as Pima County Supervisor for District S; Lawrence Fleischman, individually and in his official capacity as judge of the Pima County Superior Court, Division 19; Bemardo P. Velasco, in his official capacity as judgc of the Pima County Superior Court, Division 11; Fred T. Boice, individually and in his of ficial capacity as trustee in bankruptcy; Peter David Beren, in dividually; Susan G. Boswell, individually; and Streich Lang, P.A., a professional law association.

Pursuant to Rule 29.1, of the Rules of the Supreme Court of the United States of Title 28, United States Code, Respondent Beren discloses the following list of wholly owned subsidiaries of The JNC Companies, an Arizona corporation:

JNC Realty Corporation
JNC Construction Resources Corporation
JNC Financing Consultants, Inc.
JNC Business Planning Corporation
JNC Development Corporation
JNC Information Systems, Inc.
Ventana Financial Corporation
JNC Agencies, Inc.
Rillito Concessions, Inc.
Rillito Operations, Inc.

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v.

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Respondents.

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Peter Beren, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is attached as A-1 in the Appendix of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The original Complaint, made up of 374 pages and approximately 1875 pages of exhibits, was filed on May 23, 1990 in an effort to enjoin ongoing state court criminal proceedings. Without designating it as such, Petitioners requested leave to amend the

pleadings by inserting four lines in a 14 page Motion for Reconsideration filed on July 30, 1990. The district court granted the request by way of minute order dated September 7, 1990. Petitioners were allowed 20 days to make the amendment, and, after requesting an extension, were allowed until October 19, 1990 to correct the pleadings.

Petitioners again requested an extension on October 18, 1990, which the court granted on November 14, 1990, giving them until December 17, 1990 to produce the First Amended Complaint. On December 18, 1990, Petitioners filed yet another request for an extension of time, which the court granted on December 19, 1990, allowing Petitioners until December 21, 1990 to amend. Counsel for Petitioners was then warned that all future pleadings and briefs would conform to local rules absent "extraordinary good cause."

The First Amended Complaint, which was filed on December 21, 1990, consisted of 422 pages, with about 2700 pages of exhibits, in total standing 11 inches tall. On January 31, 1991, the Defendants below Boswell and Streich Lang, moved to dismiss the First Amended Complaint on the basis of Rules 8(a)(2) and (3), Rule 41(b) and Rule 21. The district court dismissed the First Amended Complaint with prejudice on February 7, 1991, citing violations of Rules 8(a), 8(e) and 41(b). The dismissal operated as an adjudication on the merits. In its order of dismissal, the court gave the Petitioners 10 days to file an amended complaint containing a maximum of 15 pages, or alternatively, the judgment would become final.

Instead of filing an amendment in keeping with the parameters set by the district court, the Petitioners filed, on February 22, 1991, a Motion for Reconsideration, which the district court denied. Consistent with the order of February 7, 1991, the case was dismissed with prejudice, and judgment was entered accordingly on February 25, 1991. The Petitioners filed a notice of appeal on February 26, 1991. On March 2, 1992, the Ninth Circuit issued its Memorandum Decision holding that the district court had subject matter jurisdiction, that this Court's Younger v. Harris, 401 U.S. 37 (1971), mandate did not bar the district court's dismissal with

prejudice, and Petitioners' appeal was frivolous for the reason that the outcome of the appeal was clearly apparent and awarded double costs against the Petitioners. On April 27, 1992, the Ninth Circuit denied Petitioners Petition for Rehearing En Banc.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

The petition is untimely.

The Petitioners' Petition for Rehearing En Banc of the decision they wish to appeal was denied on April 27, 1992. The Petition for Review by this Court was filed on September 1, 1992, more than ninety days since the denial of Rehearing En Banc by the Court of Appeals, and the period for applying for a writ of certiorari has not been extended by a Justice of this Court (U.S.C., Title 28, Sec. 2101(c) and Rule 20 of this Court). The only action taken by the Ninth Circuit after April 27, 1992 was an award of attorney's fees to some of the Respondents on June 12, 1992. The award of attorney's fees did not change the judgment, and in any event Respondent Beren was not affected by this award of fees.

The awarding of fees was a post-judgment matter falling in the area of costs. Even if viewed otherwise, this Court decided in Federal Trade Commission v. Minneapolis-Honeywell Co., 344 U.S. 206 (1952) that a substantive change in a judgment not affecting the portion sought to be reviewed does not extend the time for seeking review of the unchanged portion. This Respondent did not receive the attorney fees awarded. The award of attorney's fees has no relevance to the litigation between Respondent Beren and the Petitioners. Therefore, Petitioners' application for writ of certiorari is untimely and should be denied with respect to all issues relevant to this Respondent.

II.

The issues raised in the petition are not important enough to warrant granting a writ of certiorari.

Petitioners do not even attempt to explain why the issues in this case are important enough to warrant review by this Court. This case involves a sanction for an abuse of the Federal Rules of Civil Procedure, and turns on facts unique to this litigation and not likely to be repeated. The Ninth Circuit Court of Appeals found the appeal to be so lacking in merit as to be frivolous. There is no conflict of decisions, and the issues at stake here matter little to anyone other than the parties to this litigation. The questions raised by the Petitioners do not warrant review.

III.

The court below fully considered and corrected decided the issues.

A. Dismissal of this Case Pursuant to Rules 8(a) and (e), 21 and 41(b) of the Fed. R. Civ. P. did not Constitute an Abuse of Discretion.

1. Standard of Review

A decision to dismiss an action pursuant to Rule 41(b), Fed. R. Civ. P., will not be overturned on appeal unless it is apparent that the district court abused its discretion, and not until there is formed the definite and firm conviction that the district court committed clear error. Schmidt v. Herrmann, 614 F.2d 1221, 1224 (9th Cir. 1980); Nevijel v. North Coast Life Ins. Co., 651 F.2d 671, 674 (9th Cir. 1981). The district court dismissed this case on the basis of Rules 8(a), 8(e), 41(b) and Rule 21, Fed. F. Civ. P. In reviewing a district court's decision to dismiss, the court of appeals may affirm on any ground supported by the record. Hatch v. Reliance Insurance, 758 F.2d 409 (9th Cir. 1985).

2. Discretion to Dismiss on the Basis of Rules 8(a) and (e).

The original Complaint filed by the Petitioners in this action

is 373 pages long, along with an additional 1,875 pages of exhibits. The Petitioners' First Amended Complaint is 422 pages in length, with approximately 2800 pages of exhibits. Rule 8(a), Fed. F. Civ. P., requires a "short plain statement of the claim showing that the pleader is entitled to relief," and Rule 8(e) requires that such pleading contain "simple, concise, and direct" averments. The Petitioners' Complaint violated these requirements. Additionally, a review of the case law concerning the requirements imposed by Rules 8(a) and 8(e), Fed. F. Civ.P., indicates that the federal courts have thrown out the complaints of litigants whose transgressions against these rules were much less significant than those demonstrated by the petitioners. For instance, the court in Nevijel held that an amended complaint consisting of 23 pages along with 24 pages of addenda violated Rules 8(a) and 8(e), justifying dismissal pursuant to Rule 41(b), Fed. R. Civ. P. See also, the cases cited in the Ninth Circuit's Memorandum opinion.

These cases all indicate that the discretion of the trial court to enforce the rules is routinely upheld. More striking, however, is that none of the facts in these cases come even close to matching the magnitude of the abuse of the rules which has been demonstrated by the Petitioners in this case. It is unlikely that a pleading that has to be carried and served in a carton box qualifies as a short and plain statement of a claim.

Although it cannot seriously be suggested that the district court abused its discretion in determining that the Petitioners' gigantic, repetitious, prolix, and confusing Complaint violated Rule 8, the Petitioners nevertheless offer up a series of unconvincing excuses for such behavior. For example, Petitioners contend that under the brevity requirements of 8(e)(1) each individual count of a complaint should be tested for simplicity and brevity, rather than by looking at the entire complaint as a whole. This argument cannot excuse the sheer size of the First Amended Complaint. The First Amended Complaint contains approximately 50 causes of action, or an average of 54 pages per cause. Even if taken separately, the length of each count requires dismissal. Moreover, considering the manner in which Petitioners repeatedly interincorporated counts,

parties and allegations, the sincerity of their argument about viewing the counts individually is questionable.

Petitioners contend that Foman v. Davis, 371 U.S. 178 (1962), stands for the principle that the federal rules should be construed to secure the just, speedy and inexpensive determination of every action. Foman, 371 U.S. at 181-182. With pleadings of this magnitude, there was little chance of an expedited conclusion had the Petitioners' pleadings been allowed. To have accepted this pleading at its present length would not have been in accordance with sound judicial policy, and to have done so, would have invited future litigants to completely ignore the federal rules as the governing principles of procedure in federal courts. The Petitioners' First Amended Complaint also created substantial and unnecessary work and expense for all parties and the court.

Petitioners complain that the court led them to believe that it would accept a First Amended Complaint longer than the original Complaint, because the Petitioners had claimed discovery of additional information. They argue that they should have earlier been alerted to the district court's concerns about length since the issue had been raised by the Respondents. This argument misses the point. First, as discussed further below, Petitioners had access to the prior motion regarding Rule 8 violations, and the court had no obligation to warn the Petitioners about the relevant case law related to Rule 8. Second, the court's order of February 7, 1991, allowed Petitioners 10 days to amend the First Amended Complaint and informed them that the amended pleading could not exceed 15 pages. In response, the Petitioners chose to do nothing. Petitioners' claim of lack of notice is frivolous.

3. Propriety of Dismissal Under Rule 41(b)

While the remedy of dismissal with prejudice for failure to follow a court's rule or order is harsh, such an action by the court is appropriate in aggravated circumstances, as occurred at the trial level in this case. Von Poppenheim v. Portland Boxing Comm., 442 F.2d 1047 (9th Cir. 1971), cert. denied, 404 U.S. 1039 (1972), reh.

denied, 405 U.S. 999 (1972). All that is required of the judge is that possible and meaningful alternatives be reasonably explored. Id. See also, Nevijel, 651 F.2d at 674. Although sanctions short of a dismissal under Rule 41(b) are available in the event of a parties' failure to comply with the trial judge's order, the judge need not exhaust them before dismissing the case. Id.

This Writ for Certiorari is premised in part on an assertion that the Petitioners were taken by surprise and not properly forewarned that the court's patience with their abuses might eventually run out. Contained in the Statement of the Case are the many instances in which the district court gave Petitioners and their counsel opportunities to produce proper pleadings. No authority is available which would support the proposition that the district court was required to provide warning of matters that are clearly embraced by the concept of common sense. Petitioners were given an opportunity to amend their Complaint to comply with the court's order and chose not to do so. Neither naivete nor unfair surprise are credible excuses for the form in which this suit was filed and the way in which it was subsequently managed.

The court was completely justified in dismissing this claim with prejudice under the circumstances. An ample body of law, clearly applicable to these pleadings, and to the possibility of dismissal with prejudice for failure to correct such pleadings, was brought to the attention of the Petitioners early in this case, and was reasserted throughout the district court proceedings.

4. Petitioners' Arguments of the Need for Expanded Pleadings for the Younger Claims, Racketeering Claims, and Civil Rights Claims Do Not Apply to Respondent Beren.

Petitioners argue that the length of their pleadings was justified because of the heavy pleading requirements of Younger Claims, Racketeering Claims and Civil Rights Claims. This argument does not apply to Respondent Beren because it was clear before the original Complaint was filed that it was impossible to state a proper claim against this Respondent. The only purpose of

the litigation against Respondent Beren was to harass.

The frivolous racketeering claims against Respondent Beren arise from his testimony as a witness before the Pima County Grand Jury. Respondent has absolute immunity against any claims for damages arising out of his testimony in a judicial proceeding. Western Technologies v. Sverdrup & Parcel, 154 Ariz. 1, 4, 739 P.2d 1318 (App. 1987); Green Acres Trust v. London, 141 Ariz. 609, 612-613, 688 P.2d 617 (1984); Prosser and Keeton, Law of Torts, §114 at page 817 (5th Ed. 1984).

The federal racketeering claim also fails because it does not show a pattern of racketeering activity. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. H.J. Inc. v. Northwestern Bell Telephone Company, 109 S. Ct. 2893 (1989); Pitts v. Turner and Boisseau Chartered, 850 F.2d 650 (10th Cir. 1988). In addition, there is no allegation that Respondent Beren is involved in an enterprise. He is simply an individual who followed court orders to testify. He certainly did not engage in his testimony for profit. There is nothing in the First Amended Complaint that would support a cause of action against Respondent Beren for racketeering.

The civil rights claims made against Respondent Beren are equally groundless. These claims also fail because Respondent is immune from any civil liability as a result of his participation in judicial proceedings. Burns v. County of King, 883 F.2d 819 (9th Cir. 1989); Holt v. Castaneda, 832 F.2d 123 (9th Cir. 1987), cert. denied, 485 U.S. 979 (1988), Burke v. Miller, 580 F.2d 108 (4th Cir. 1978); Daloia v. Rose, 849 F.2d 74 (2nd Cir. 1988), cert. denied, 488 U.S. 898 (1988). Witnesses are absolutely immune in a civil suit for damages for false and/or malicious statements made while testifying before a grand jury, or in trial, as long as the testimony was related to the subject matter of the inquiry. Lofland v. Meyers, 442 F.Supp. 955 (S.D.N.Y. 1977). The immunity granted witnesses under §§1983 and 1985 also extends to civil liability under Bivens theories. See, O'Connor v. State of Nevada, 507 F.Supp. 546 (D.Nev. 1981), aff'd, O'Connor v. Nevada, 686 F.2d 749 (9th Cir. 1982).

Petitioners might claim Respondent Beren's testimony was an invasion of privacy. Such a claim would be unavailing since immunity also extends to an action for invasion of privacy because of an alleged violation of the attorney-client privilege. Prosser and Keeton, Law of Torts, §117 at 868 (5th Ed. 1984). The fact the testimony of Respondent Beren was compelled by court order provides additional protection to Respondent Beren from later civil liability. McCormick on Evidence, §93 at 223 (3rd Ed. 1984); ABA Code of Responsibility, Disciplinary Rule 4-101(c): "A lawyer may reveal confidences or secrets when . . . required by law or court order."

The only testimony that Petitioners really objected to was Beren's admission that he did not work for Mr. Jenkins individually. Testimony identifying a client is not within the attorney client privilege. McCormick on Evidence, §90 at 215 (3rd Ed. 1984). There was also no privilege since the testimony was in regard to a future crime-fraud. Such testimony is also not protected by the attorney client privilege. McCormick on Evidence, §90 at 229 (3rd Ed. 1984).

The argument that Petitioners needed to allege additional facts to state a cause of action is simply untrue. Despite 11 inches of pleadings they were still unable to state a cause of action against this Respondent. Instead, the only purpose of the burdensome pleadings was to confuse matters sufficiently so that the lack of substance of the allegations would go unnoticed. This is precisely the evil Rule 8 was designed to prevent. The argument that dismissal was improper because of the additional pleading requirements of Younger claims, racketeering claims, and civil rights claims is groundless.

5. Violation of Rule 21

Petitioners' violation of Rule 21, F.R.C.P., was but one in a series of rule violations. The tactic was yet another reason why the court was justified in dismissing this case with prejudice for failure

to follow the rules.

IV.

The district court had jurisdiction to dismiss Petitioners' lawsuit pursuant to Fed. R. Civ. P. Rules 8(a), 8(e), 21 and 41(b).

A. Irrelevancy of Younger on Appeal

The Petitioners' argument that the district court lacked jurisdiction to dismiss this suit is—at first glance—confusing, and—after scrutiny—frivolous. The Petitioners have conjured up the notion that the federal court, faced with an argument of an exception to the Younger abstention doctrine, can only exercise jurisdiction if it rules in their favor. By this reasoning, the district court has no jurisdiction over Petitioners' cause of action because jurisdiction sufficient to dismiss the action is only conferred upon the district court after it has made a finding of bad faith or harassment in the state court criminal prosecution. Petitioners assert that the district court has no jurisdiction until such time as it determines that intervention is appropriate, and that therefore the court's sanction of dismissal prior to such intervention is void ab initio due to the total want of jurisdiction. Petitioners' argument is illogical, incorrect, and in conflict with the legal concepts embodied in the term jurisdiction.

The legal concept of a court's jurisdiction deals with the basic power and authority to act at all, rather than the manner in which a court should act if it has such power. "The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress..." Neirbo Co. v. Bethlehem Shipbuilding Corporation, 308 U.S. 165, 167 (1939). "When concerned .. with the power of the . . . federal courts to entertain litigation .. `jurisdiction' means the kinds of issues which give right of entrance to federal courts." Skelly Oil Co. v. Phillips Petroleum, 339 U.S. 667, 671 (1950). In the case at bar, the district court was given jurisdiction over the Petitioners' Complaint pursuant to federal question and civil rights statutes based upon the alleged claims

under 42 U.S.C. §1983 and 18 U.S.C. §1964. Indeed, the petitioner invoked the jurisdiction of the district court when he filed his Complaint.

This Court held "If the complaint raises a federal question, the mere claim confers power to decide that it has no merit, as well as to decide that it has." Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 249 (1951). The district court was given the jurisdiction to adjudicate this matter by Congress, and this grant of jurisdiction was not dependent upon any subsequent determination by the court, e.g., a perceived authority to intervene Younger v. Harris, supra. "The jurisdiction of the court can never depend upon its decision upon the merits of the cause brought before it, but upon its right to hear and decide it at all." Ex parte Watkins, 32 U.S. 568, 572 (1833).

Before the Petitioners would have been entitled to obtain the relief requested, it would have been necessary to first prevail on the issue of whether an exception to the Younger abstention doctrine was present. This necessity would permit the federal court to proceed and adjudicate the Petitioners' claims, which admittedly involve issues over which the district court has subject matter jurisdiction. The Younger abstention doctrine itself, however, is not a jurisdictional matter. Hydrostorage v. Northern Cal. Boilermakers, 891 F.2d 719 (9th Cir. 1989), cert. denied, 111 S. Ct. 72 (1990); Waldron v. McAtee, 723 F.2d 1348, 1351 (7th Cir. 1984).

This conclusion is also mandated by the Supreme Court's determination in Sosna v. Iowa, 419 U.S. 393 (1975). In Sosna, this Court indicated that it had requested that the parties address themselves to the issue of whether Younger v. Harris should affect whether or not the district court or the Supreme Court should reach the merits of the constitutional issue, and, after being urged by the parties to reach the merits, the Court decided to rule upon the constitutional issue presented. Sosna v. Iowa, 419 U.S. at 397 n 3. Because it is well settled that "mere agreement of the parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case", People's Bank v. Calhoun, 102 U.S. 256, 260-61 (1880), it is apparent the Younger abstention is not jurisdictional,

and any failure to abstain pursuant to Younger would not result in any extrajurisdictional act by the district court. Petitioners' arguments, asserting the judgment of dismissal of the district court is void ab initio for lack of jurisdiction, are baseless and wrong.

Deakins v. Monaghan, 484 U.S. 193 (1988), contains nothing whatsoever which would reflect upon any supposed lack of jurisdiction of the district court to decide the Petitioners' case. Deakins is inapposite in that it dealt with Younger abstention issues, and it had nothing to do with the propriety of sanctioning litigants who violate the Federal Rules of Civil Procedure. The district court neither abstained nor proceeded in the case at bar. The issues in this case no longer include Younger abstention issues. This is a Rule 41(b) sanctions case. Since Deakins dealt with the federal court's duty to retain jurisdiction when claims are properly before it, it is hard to imagine what relevance such a case would have to litigants, such as the Petitioners, who have been thrown out of the federal court because of egregiously improper conduct and defiance of the court's own rules. If there is any legal authority for the unlikely proposition asserted by the Petitioners that Rule 41(b), Fed. F. Civ. P. does not apply to this case, none has been provided.

Although the foregoing indicates that the district court had the jurisdiction to determine the Petitioners' case, it is not apparent that the district court's jurisdiction over the subject matter of the Petitioner's cause of action was even a necessary prerequisite to impose the court's sanction of dismissal pursuant to Rule 41(b). This is true because the Petitioners have failed to follow the Federal Rules of Civil Procedure. At least in the Rule 11 context, "[t]he fact that the district court lacked jurisdiction to consider the merits of the case did not preclude it from imposing sanctions." Orange Production Credit v. Frontline Ventures, Ltd., 792 F.2d 797 (9th Cir. 1986).

Since the Petitioners placed themselves before the district court, they should reasonably be expected to follow the rules of the tribunal which they themselves invoked, and they should not now be heard to assert that such tribunal has no authority to act in a manner which negatively impacts upon theme.

B. The Doctrine of Judicial Estoppel

The Petitioners should be estopped from claiming that the district court lacked jurisdiction in this case by the common law principle of judicial estoppel. The Petitioners invoked the jurisdiction of the court at the outset of this action and have repeatedly urged in the court below that the Younger abstention doctrine should not apply, and that the court should assert jurisdiction. They now argue that the court should never have asserted jurisdiction.

These inconsistent arguments are barred by the doctrine of equitable estoppel. This doctrine applies to arguments made at the district court level which are contradicted on appeal. The doctrine is intended to prevent litigants from playing "fast and loose with the court" by asserting inconsistent positions. Rockwell International Corp. v. Hanford Atomic Metal Trades Council, 851 F.2d 1208, 1210 (9th Cir. 1988). The doctrine is intended to foster "the orderly administration of justice and ... the dignity of judicial proceedings. State of Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1215 (9th Cir. 1984), cert. denied, 469 U.S. 1197 (1985). The doctrine is to be applied to prevent the perversion of the judicial process by discouraging intentional self-contradiction which has been used as a means of obtaining unfair advantage in a forum whose interest is justice. Matter of Cassidy, 892 F.2d 637, 641 (7th Cir. 1990), cert. denied, 111 S. Ct. 48 (1990).

The Petitioners have invoked, asserted, and argued the jurisdiction of the district court over their claim. Having done so, the Petitioners should be precluded from taking the inconsistent legal position which they have taken upon appeal. It would not be appropriate to permit the Petitioners to use self-contradiction to avoid the consequences of their improper acts, nor to permit further abuse of the Court or the Respondents at the hand of these Petitioners.

This case is ideally suited for the application of judicial estoppel. Petitioners' sudden change in position should not be permitted, and in the context of this case, the tactic should be

sanctioned.

III.
Sanctions and fees on appeal.

Neither Petitioners nor their counsel can reasonably assert in good faith that the mass of repetitive paper which they deposited in the federal court was consistent with Rule 8. The Ninth Circuit Court of Appeals had ample reason to sanction the conduct of the Petitioners and their counsel in this case. Because this case was brought primarily as a §1983 action and is not only frivolous but brought for improper purposes, motions for fees and sanctions pursuant to Rule 11 and 42 U.S.C. §1988 are presently pending before the district court.

Petitioners' invocation of the Younger line of cases as an attack in this Court on the district court's jurisdiction is spurious. Younger and its progeny dealt with federal court interference in state court proceedings by way of injunction. Under Petitioners' logic, a federal court would never have jurisdiction, unless it was prepared to make a ruling that the Younger abstention does not apply. This line of thinking would put the Petitioners in a "win-win" situation. The district court would be required to either intervene in the criminal proceeding or dismiss for want of jurisdiction. The court would thereby be divested of power to make a decision on the merits, and would, in effect, be forced to leave the Petitioners free to deposit the same pleadings in state court. The application of Younger urged by Petitioners is not only illogical, but would amount to inviting every state court criminal defendant to seek federal intervention in his or her state court prosecution. Petitioners and their counsel expose, by the argument related to Younger, a desire to control the decision-making process of the district court in a highly inappropriate manner. Petitioners wish to "corner" the district court, forcing it to either accept jurisdiction and decide in their favor, or to not exercise jurisdiction.

Petitioners' argument is not a surprise, in light of the fact that the allegations of the federal civil complaint are based in large part on Petitioners not getting their way before a variety of judges. As

judges and officials did not do what Petitioners wished, they were spun into a cobweb of alleged conspiracy. Petitioners' counsel cooperated in this approach to the judicial system.

Because none of the issues raised on appeal had merit, the appeal was properly sanctioned under Rule 38, Fed. R. App. P. Under Rule 38, the court of appeals may award fees and single or double costs "when the result is obvious and the arguments on appeal wholly lack merit." McCarthy v. Mayo, 827 F.2d 1310, 1318 (9th Cir. 1987). The decision of the Ninth Circuit Court of Appeals to sanction the Petitioners was proper.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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